

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
77-1438

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

Against

RUSSELL BUFALINO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT BUFALINO'S PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

WILFRED L. DAVIS
67 Wall Street
New York, New York 10005

CHARLES P. GELSO
1200 United Penn Bank Building
Wilkes Barre, Pa. 18701

Attorneys for Appellant
Russell Bufalino

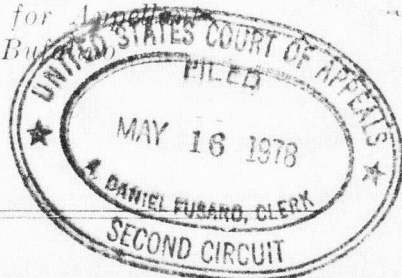


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Grounds for Rehearing	1
Argument	2
Conclusion	6

TABLE OF AUTHORITIES

Cases:

<i>Blockburger v. U.S.</i> 284 U.S. 299 (1932)	5
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	2
<i>Remmer v. U.S.</i> , 347 U.S. 227 (1954)	3, 4
<i>Simpson v. U.S.</i> , 55 L. Ed. 2d 70 (1978)	6
<i>U.S. v. Crutcher</i> , 405 F. 2d 239 (2nd Cir. 1968)	3
<i>U.S. v. Miller</i> , 381 F. 2d 529 (2nd Cir. 1967)	2
<i>U.S. v. Sperling</i> , 560 F. 2d 1050 (2nd Cir. 1977)	5
<i>U.S. v. Taylor</i> , 562 F.2d 1345 (2nd Cir. 1977)	3

Statute and Rules:

Title 18, U.S.C.A., Section 894	2, 5, 6
Federal Rules of Criminal Procedure, Rule 43	1, 3

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1438

UNITED STATES OF AMERICA,

Appellee,

against

RUSSELL BUFALINO,

Defendant-Appellant.

PETITON FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Statement of the Case

Appellant, Russell Bufalino, respectfully petitions for rehearing pursuant to Fed. R. App. P. 40(a) and suggests rehearing in banc, of the decision by a panel of this Circuit (Judges Hays, Feinberg and Mansfield) filed May 2, 1978 affirming a judgment of conviction entered in the U.S. District Court for the Southern District of New York.

Grounds for Rehearing

Appellant raises three separate grounds for rehearing. First, the Court mistakenly interpreted the record as showing a waiver on the part of the Appellant Bufalino of his right under Rule 43 of the Federal Rules of Criminal Procedure to be present during the Court's voir dire of the jury

concerning possible prejudice from third party contact. Second, the Court overlooked portions of the record which show the third party contact with the jury in this case was concerning a matter pending before the jury, thus giving rise to a presumption of prejudice. Finally, it is submitted that the Court misinterpreted Title 18, Section 894 of the U.S.C.A. as defining two separate offenses allowing the imposition of two separate sentences.

Argument

I

This Court found that the Appellant Bufalino waived his right to be present during the Court's questioning of jurors in chambers and outside the presence of counsel concerning the activity of certain spectators during trial. It is submitted that this Court's reliance on *U.S. v. Miller*, 381 F. 2d 529 (2nd Cir. 1967) is misplaced since in *Miller*, defense counsel expressly requested the trial Court to make inquiry without counsel being present. On page 2869 of its slip opinion, this Court suggests that a similar request was made by the attorney for Sparber, a co-defendant. A review of the record reveals that Sparber's counsel requested a hearing but did not request that the hearing be held outside the presence of counsel. It was after Sparber's request that the trial Court stated that it would conduct the voir dire outside the presence of counsel. Furthermore, even if Sparber did expressly waive his right to be present, that waiver cannot be applied vicariously to the Appellant Bufalino.

Since the record is void of an express waiver on the part of Bufalino, this Court should indulge in every reasonable presumption against waiver. *Johnson v. Zerbst*, 304 U.S. 458 (1938). The only possible basis for the Court's determination of waiver is the failure of Bufalino's counsel to specifically object to the procedure used by the trial Court. Although some Circuits seem to hold that a failure

to object is sufficient to constitute waiver of the defendant's right under Rule 43, this Circuit has explicitly stated not only that the defendant's right to be present cannot be waived by counsel's failure to object to the procedure used by the trial Court, but also that trial counsel does not have authority to bind the defendant to a decision to waive the defendant's presence. *U.S. v. Crutcher*, 405 F. 2d 239 (2nd Cir. 1968); See also *U.S. v. Taylor*, 562 F. 2d 1345 (2nd Cir. 1977) where the court required advance consent of both counsel and the defendant. As in *Crutcher*, *supra*, there is nothing in the record from which this Court could infer that the Appellant was advised of his right to be present during the questioning of the jury, nor is there anything in the record to show the Appellant's knowing and intelligent waiver of that right. In accordance with this Court's holding in *Crutcher*, *supra*, it is submitted that at the very least, the Appellant is entitled to have the matter remanded for a determination of whether he knowingly and intelligently waived his right to be present during the Court's interrogation of the jury.

II

This Court determined that spectator contact with the jury did not warrant a mistrial since the contact did not relate to a matter pending before the jury and thus there was no presumption of prejudice under *Remmer v. U.S.*, 347 U.S. 227 (1954).

At page 2870 of its slip opinion, this Court characterized the contact in question as "laughs, stares, rebuffed efforts to start conversations". This Court seemingly overlooked the fact that jurors complained of being followed by the men described by the trial Court as "husky and menacing".

The clerk told the trial Court that the jurors complained "no matter where they went, they keep bumping into these people, elevators, outside". (A83-A84)

Juror Henry testified, "Everywhere the three of us (jurors) went yesterday, we saw one or two. Then another one also. I brought it to the rest of the jurors' attention." (A89) These were the same husky and menacing spectators who were laughing, staring and attempting to start conversations with the jury.

Juror Valentine who suggested to the rest of the jurors that they complain about the spectators to the Court testified, "This morning in the jurors' room, there was a discussion about quite a few guys, jurors being followed". (A95)

Juror Ortiz testified:

"A. Yesterday, when we went out for lunch, there were two heavy fellows outside. The elevator was delayed. And then they said something to two of my companions, two jurors. I didn't pay attention.

Q. Did you hear what they said?

A. No. I don't want to pay attention to them and I looked the other way. They followed the next time." (A97)

The trial Court characterized this contact as "psychological pressure" (A84), and he determined that the jurors associated the spectators with the Appellant. (A190, A164-A165) The jurors apparently felt that the contact in question had something to do with the case, since they discussed it among themselves, warned other jurors about the spectators and complained to the Court.

A review of these facts in the context of the complete voir dire of the jury requires a finding that the contact related to the case being tried before the jury, thus raising a presumption of prejudice under *Remmer v. U.S.*, *supra* and requiring a new trial.

III

Appellant was convicted of conspiracy to use extortionate means and participation in any way in the use of extortionate means to collect an extension of credit under Title 18, U.S.C.A., Section 894. The test to be applied in determining whether the Appellant can be given a cumulative sentence for these convictions, commonly known as the "Blockburger Test", is whether each offense requires proof of a fact which the other does not. *Blockburger v. U.S.*, 284 U.S. 299, 304 (1932).

The "Blockburger Test" was recently explained by this Court in *U.S. v. Sperling*, 560 F. 2d 1050 (2nd Cir. 1977), wherein this Court held cumulative sentencing improper "whenever it appears that the proof of one offense proves every essential element of another" or in other words, "where one offense cannot be committed without necessarily committing another offense".

We agree with this Court that proof of the substantive offense under Section 894 does not necessarily prove conspiracy. However, the converse is not true and in applying the "Blockburger Test" to this statute, it is submitted that this Court incorrectly defined the substantive offense as the use of extortionate means to collect an extension of credit. The language of Section 894 defines the substantive offense in much broader terms, to wit, "participation in any way" in the use of extortionate means. The ambit of the substantive offense and the words "participation in any way" (meaning to share with others in some activity or enterprise as defined by Webster's New 20th Century Dictionary of the English Language) necessarily includes conspiracy (normally defined as an agreement between two or more individuals to commit a crime) and to prove conspiracy necessarily proves participation.

The Congressional intent with respect to this statute is at best ambiguous and the United States Supreme Court has

recently stated in *Simpson v. U.S.*, 55 L. Ed. 2d 70 (1978):

“Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . . This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”

In this case, an application of the “Policy of Lenity” requires that this Court interpret Section 894 so as to prevent cumulative sentencing of the Appellant for convictions of conspiracy and the substantive offense.

Conclusion

Since co-defendant Sparber has also petitioned for re-argument, the defendant Bufalino wishes to incorporate in this petition by reference any arguments made by that defendant which may also pertain to Mr. Bufalino but which are not explicitly contained herein.

For all the foregoing reasons, the within Petition should be granted, the Opinion of the panel vacated, the judgment of conviction reversed and a new trial granted.

Respectfully submitted,

WILFRED L. DAVIS
CHARLES P. GELSO
*Attorneys for Appellant,
Russell Bufalino*

Due and timely service of Two copies
of the within PETITION is hereby
admitted this 16TH day of MAY 1978.

.....
Attorney for APPELLEE